Supreme Court, U.S.
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No. 87-1919

In The

# Supreme Court of the United States

October Term, 1987

YUKON ENERGY CORPORATION,

*Petitioner,*

vs.

WILLIAM F. HAGERMAN,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Supreme Court From the Eighth Circuit Court of Appeals**

## PETITION FOR CERTIORARI

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## QUESTION PRESENTED

I. When rendering decisions on summary judgment motions, may lower courts and courts of appeal properly weigh evidence and draw inferences in favor of the plaintiff as moving party where the non-moving defendant has offered evidence of plausible defenses which could support a jury verdict in its favor?

## PARTIES TO THE PROCEEDING

Petitioner:

Yukon Energy Corporation

Respondent:

William F. Hagerman

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*Petition for a Writ of Certiorari*
*to the United States Supreme Court*
*From the Eighth Circuit Court of Appeals*

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## PETITION FOR CERTIORARI

Petitioner Yukon Energy Corporation prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered and filed in this action on February 9, 1988.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit affirming the order of the District Court is reported at 839 F.2d 407 and is reprinted in Appendix A to this Petition. The order of the United States District Court for the District of Minnesota is contained in Civ. No. 4-85-960 (Dist. Minn. October 21, 1986) and is reprinted in Appendix B to this Petition.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered and filed on February 9, 1988. A Petition for Rehearing was denied on March 23, 1988. This Petition for Writ of Certiorari is filed within 90 days thereof.

On April 21, 1988 the Court of Appeals stayed the mandate in this case until May 23, 1988 and ordered that if within that time a Petition for Writ of Certiorari has been filed, the stay shall continue until the final disposition of the case by the Supreme Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based upon diversity of citizenship under 28 U.S.C. § 1332. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

## RULE INVOLVED

This case involves Rule 56(c) of the Federal Rules of Civil Procedure. This rule deals with motions for summary judgment and provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The full text of Rule 56 appears in Appendix C to this Petition.

## STATEMENT OF THE CASE

This case involves important questions concerning the application of summary judgment standards and a civil defendant's right to a jury trial. The Supreme Court of the United States recently set forth standards for summary judgment in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). While those cases perhaps encouraged greater use of Rule 56 motions, the Court made clear that the role of the judge in such motions is not to weigh evidence or draw inferences from facts, but rather to ascertain whether there is a genuine issue of fact such that a reasonable jury could return a verdict for the non-moving party. This standard is particularly crucial when summary judgment is sought by a plaintiff and would deny the defendant's right to a jury trial.

In the instant case, the Court of Appeals affirmed the District Court's grant of summary judgment for the plaintiff on both liability and damages. In so doing, the Court of Appeals applied standards that are in direct conflict with the summary judgment standards set forth in *Matsushita, Celotex* and *Anderson.* The court weighed evidence and failed to draw all justifiable inferences in favor of the non-moving party. The consequence is that a money judgment was entered against a defendant even though the defendant had testified to facts constituting complete defenses to the claim and the plaintiff had never refuted those facts under oath.

Plaintiff, Hagerman, sued for specific performance or damages to enforce a stock option contained in an agreement with defendant, Yukon Energy Corporation. In opposition to plaintiff's motion for summary judgment, Yukon Energy Corporation presented evidence that the agreement had been terminated and that plaintiff had himself breached the agreement and was estopped from enforcing the option. The Eighth Circuit disregarded Yukon's evidence by weighing against it evidence of subsequent conduct and by drawing only those inferences from that subsequent conduct which were contradictory of Yukon's direct evidence. Further, the Eighth Circuit even determined damages, again by weighing competing evidence and drawing the most favorable inferences to the plaintiff as to the date of breach and the value of the stock.

The decision of the Eighth Circuit is evidently based upon a misconstruction of *Matsushita, Celotex* and *Anderson.* Each of those cases involved summary judgment against the plaintiff, after opportunity for full discovery, based upon the plaintiff's failure to produce evidence of the plausibility of its claim. The Eighth Circuit failed to recognize the marked differences in the factual context of those cases and appears to have concluded that they authorize a judge to pre-empt the jury's role where the judge believes the facts strongly favor the moving party. This Court should grant certiorari to review how the lower courts have used *Matsushita, Celotex,* and *Anderson;* to clarify whether those cases represent a new view of summary judgment in civil litigation; and to address the standards applicable when summary judgment is sought by the plaintiff, without full discovery, on issues where the plaintiff will bear the ultimate burden of proof.

### A. Factual Background

Petitioner Yukon Energy Corporation ("Yukon") is involved primarily in the manufacture and supply of heating products. During March of 1983, David Tjosvold, President and Chairman of Yukon, learned that another company developed an oil condensing furnace which was 95% fuel efficient and that it was willing to sell its new technology for $100,000. During August of 1983, Yukon entered into an agreement with the company which provided Yukon with an option to purchase the new technology. Yukon purchased the technology with general corporate funds.

Hagerman, then a close friend of Tjosvold, was very interested in the potential of the new technology and offered to furnish Yukon with cash to purchase and develop the technology. After Yukon purchased the technology, Hagerman ultimately provided Yukon with $150,000 and Yukon transferred legal title in the technology to Hagerman, who licensed Yukon to use it for ten years. The parties executed a contract which provided that Yukon pay Hagerman royalties of no less than $18,000 per year. The contract provided Yukon with an option to repurchase Hagerman's title in the technology within ten years for $175,000. Finally, the contract provided Hagerman with an option to purchase shares of Yukon equal to 5% of the shares owned by Mr. Tjosvold at book value as determined

by the accounting firm of Peat, Marwick and Mitchell in the event that Yukon carried out a public offering. (The contract is reprinted as Appendix D to this Petition.)

According to the uncontroverted deposition testimony of Mr. Tjosvold, the written contract was only a portion of the agreement between the parties. Prior to execution of the written contract, Hagerman agreed with Tjosvold that the contract could and would be changed in the event it was deemed to be unfair or one sided by Tjosvold in the future. As an inducement for the grant of the stock option, Hagerman also agreed that he would fund a public stock offering of Yukon to the extent of $2,000,000 of a contemplated $5,000,000 underwriting.

According to the uncontroverted deposition testimony of Mr. Tjosvold, Hagerman informed Tjosvold during July and October of 1984 that he wanted to end the contract and get his money back. The written agreement between the parties did not obligate Yukon to return Hagerman's money or to repurchase the technology at that time. Yet, because of Hagerman's repeated demands, Tjosvold on behalf of Yukon agreed to termination of the agreement. On October 23, Tjosvold provided Hagerman with checks for $175,000 and $18,000 and told Hagerman that he understood that this ended the agreement. As of that time Hagerman had not provided funding for any part of the public offering and he did not do so thereafter.

Upon receipt of the checks, Hagerman negotiated the checks at Yukon's bank, receiving cash. Hagerman then immediately sent a letter to Yukon giving notice of his intent to exercise the stock option.

Yukon subsequently had a reduced public stock offering for $2,500,000. In conjunction with that offering, Yukon filed registration statements with the Securities and Exchange Commission and the Minnesota Department of Commerce. The prospectus described the written agreement between Yukon and Hagerman and described Hagerman's stock option without qualification as to Yukon's defenses. It stated, in part:

> In October 1984, the Company exercised its option to repurchase the technology and the individual notified the Company of his intent to exercise his purchase option. Accordingly, the Company will issue up to 164,021 shares of its Common Stock to such individual at approximately $.23 per share upon receipt of payment therefor.

Tjosvold disputed Hagerman's right to the stock option at the time the prospectus was prepared and published. Nonetheless, he accepted the advice of counsel concerning the need to be conservative in public offering documentation and to disclose the disputed "possible" obligation of Yukon under the technology agreement. Yukon's inclusion of the above-referenced language in the prospectus was urged by Yukon's attorney for reasons he explained in his affidavit as follows:

> 2. Your affiant, and the other parties involved in the preparation of the prospectus, were advised of the existence of the written option agreement between Yukon and Mr. Hagerman in the course of their work with Yukon in the fall of 1984 and the winter of 1985. Sometime shortly before February 14, 1985, Mr. David Tjosvold, President of Yukon, informed all interested parties that he and Yukon disputed the validity of the Agreement as a result of certain conversations he had had with Mr. Hagerman.
>
> 3. It was the considered opinion of the parties involved in the preparation of the prospectus for Yukon that it would be safest to adopt a 'worst case' position in disclosing the existence of the Agreement in the final prospectus which, from the standpoint of Yukon, was a liability document. This was done due to the potentially serious adverse consequences should a more optimistic analysis be presented in the prospectus which later proved unwarranted. Accordingly, the final prospectus was written as if no dispute existed over Yukon's obligations under the Agreement with Mr. Hagerman, even though your affiant had been informed of the conversations between Mr. Tjosvold and Mr. Hagerman during which Mr. Hagerman was said to have revoked the 'stock option' provision therein.

Contrary to Hagerman's oral agreement with Tjosvold, Hagerman failed to place or purchase any of the registered stock publicly offered by Yukon and the offering was reduced from $5,000,000 to $2,500,000. Additionally, even though the prospectus indicated that 164,021 shares of Yukon common stock would be issued upon receipt of payment, Hagerman never tendered payment to Yukon or demanded his shares. Instead, after several months Hagerman commenced this action.

### B. The Decisions Below

Hagerman's motion for summary judgment relies largely upon the statements made in Yukon's prospectus. Hagerman provided no affidavit and, since he had not yet been deposed in the action, he has never denied under oath the testimony of Tjosvold. The District Court, nevertheless, determined that Yukon was estopped from arguing that the original agreement between the parties had been breached or terminated. The lower court found, in essence, that Yukon's statements in the prospectus constituted "judicial admissions" that the agreement was not modified or terminated. The court did not consider whether Hagerman was estopped from pursuing his claim against Yukon by virtue of Hagerman's breach of his promise to place $2,000,000 of the public offering.

On the issue of damages, the District Court found, as a matter of law, that the shares were to be registered; that Yukon's breach occurred on March 28, 1985 when the public offering was made; and that on that date the fair market value of the stock was $2.00 per share and the book value was $.23 per share.

The Court of Appeals affirmed the lower court decision, though on a different basis. It ruled that while Yukon's statements in the prospectus were not judicial admissions, the conduct of the parties subsequent to the tender of Yukon's checks to Hagerman precluded Yukon's defenses as a matter of law. The Eighth Circuit also found that there were no genuine issues of material fact with respect to the questions whether shares to be provided to Hagerman were to be registered or unregistered, the market value of the shares, the book value of the shares or the date of the breach.

## REASONS FOR GRANTING THE WRIT

**I. The summary judgment standard applied by the Eighth Circuit conflicts with this Court's decision in *Anderson v. Liberty Lobby, Inc.* The Eighth Circuit weighed evidence and drew inferences in favor of the party seeking summary judgment.**

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this

Court ruled that a dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party". *Id.* at 248. According to the Court, it is not the judge's function "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial". *Id.* at 249. A judge "must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [non-moving party] plaintiff on the evidence presented". *Id.* at 252. As noted by the Supreme Court:

> Our holding that the clear and convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor.

*Id.* at 255.

While the Eighth Circuit acknowledged the language of this standard, its decision-making process did not follow it. Instead, it followed a contrary standard by which evidence is weighed and inferences in favor of the non-moving party are disregarded.

The Eighth Circuit's conclusion can only be understood as being based on the misconception that *Matsushita, Celotex* and *Anderson* represent a radical departure from prior law and authorize the judge to assume a much more active role in "deciding" the facts without a jury trial. The Eighth Circuit gave no recognition to the differences that exist when summary judgment is sought by a plaintiff, when discovery is not even completed. The following discussion illustrates through examples the inappropriateness of the Eighth Circuit's analysis.

## A. Liability Issues

### 1. Termination of Stock Option

Yukon contended that Hagerman's stock option was terminated by virtue of an accord and satisfaction or oral modification of the original agreement. Yukon provided the court with the following uncontroverted evidence:

1. Hagerman assured Tjosvold prior to execution of the written agreement that the written agreement did not make any difference, that "if it isn't right, we will make it right". Hagerman informed Tjosvold that the agreement could and would be changed in the event it was deemed to be unfair or one sided by Tjosvold in the future.

2. Tjosvold testified that during July and October of 1984 Hagerman informed Tjosvold that he wanted to end the agreement and get his money back.

3. Although not required by the agreement, Yukon repurchased the technology at Hagerman's request. When Tjosvold delivered checks to Hagerman in the amounts of $175,000 and $18,000, he informed Hagerman that "I understand that this ends our agreement, here is your money like you wanted, like you requested before. I suppose that's it." Hagerman thereafter accepted the checks and cashed them.

4. Tjosvold informed his attorney, who prepared Yukon's public offering prospectus that he disputed the validity or existence of the agreement between Hagerman and Yukon at that point, and that it was his view that Hagerman had revoked the 'stock option' provision therein.

5. Hagerman never tendered a check to Yukon for shares in issue and Yukon never issued shares to Hagerman. Hagerman failed to fund any portion of the public stock offering.

This evidence provided the lower court with genuine issues of material fact with respect to the issue of whether the agreement was terminated prior to Hagerman's exercise of the stock option. Hagerman did not refute Tjosvold's testimony on these matters. The Eighth Circuit disregarded Tjosvold's testimony and found that evidence of the conduct of the parties subsequent to Yukon's delivery of the checks to Hagerman could only support a finding that the parties did not mutually agree to terminate the stock option. The Eighth Circuit noted that the only evidence of the parties' conduct following the alleged accord and satisfaction was Hagerman's attempt to exercise the option and Yukon's preparation of the stock prospectus in which Yukon unequivocally affirmed the validity of Hagerman's stock option. According to the Eighth Circuit:

> Such conduct belies Tjosvold's assertion of a mutual agreement. Yukon presents no other evidence of conduct on its own part or by Hagerman which indicates that the parties reached a mutual agreement to terminate the written stock option. For example, Yukon presents no evidence that when Hagerman gave written notice of his intent to exercise a stock option, Yukon gave written response that it no longer considered that option to be in effect. You will find that Yukon failed to create a genuine issue of material fact as to whether there was an oral modification or an accord and satisfaction.

(App. A-7)

In other words, the Eighth Circuit weighed the evidence of subsequent conduct against Tjosvold's direct evidence of the termination of the agreement and found the subsequent conduct to be controlling as a matter of law. Further, in weighing the evidence of subsequent conduct of the parties, the court drew as inferences from that conduct only those favoring Hagerman, the moving party.

As to Yukon's subsequent conduct, the prospectus statement, the lower court was provided with an affidavit from Yukon's securities attorney that explained why the prospectus statement did not disprove Tjosvold's testimony that Hagerman's stock option was terminated. A reasonable jury could believe that the prospectus statements were simply an overly conservative disclosure of risk to prevent claims from investors.

As to Hagerman's subsequent conduct, it was equivocal at best. While Hagerman did purport to exercise the option, he never tendered payment for the shares to Yukon. Hagerman's failure to tender payment supports the inference that he knew the option no longer existed.

While the Eighth Circuit found evidentiary significance in Yukon's failure to object to Hagerman's exercise of the option, it ignored the countervailing significance of Hagerman's silence. There was no evidence that Hagerman ever demanded issuance of the shares during the 10 month period between his option notice and the commencement of this action. Hagerman's silence for 10 months supports the inference that Hagerman knew that he was overreaching and that the option no longer existed. Similarly, it can be inferred that Yukon's silence in the face of Hagerman's purported exercise of the option was nothing more than a determination to not dignify Hagerman's obvious overreaching. Since Hagerman was the moving party, the court was required to make these inferences, favoring Yukon. If it had done so, genuine issues of material fact would clearly exist.

**2. Estoppel Due to Hagerman's Prior Breach**

The uncontroverted testimony of Mr. Tjosvold was that, in order to induce Yukon to provide Hagerman with the stock option, Hagerman promised to fund Yukon's offering to the extent of $2,000,000. It is uncontested that Hagerman failed to fund any portion of the public stock offering. Hagerman's breach consequently excused Yukon from honoring the stock option. In addition, the agreement certainly was unfair since, on the basis of the present judgment, Hagerman will receive a return of $483,000 on an 11 month "loan" of $150,000. Hagerman should be estopped from enforcing the option on the basis of his own breach of promise. *See Wormsbecker v. Donovan Construction Co.,* 76 N.W.2d 643 (Minn. 1956) and *Albacathen v. Bradley,* 3 N.W.2d 783, 785 (Minn. 1942).

In rendering its decision on this defense, the Eighth Circuit again failed to draw reasonable inferences in Yukon's favor. The Eighth Circuit determined that the weight of the evidence contained in the prospectus statement, coupled with an absence of evidence that Yukon later approached Hagerman about

funding for the public offering, mandated that summary judgment be entered.

The inference to be drawn from this subsequent conduct, however, was controverted by Mr. Tjosvold's uncontested testimony. If the Eighth Circuit had drawn all reasonable inferences in Yukon's favor, it would have noted that it was not necessary for Yukon to approach Hagerman in order to trigger Hagerman's contractual obligations. Hagerman had the prospectus and knew about the offering. The fact that he did not purchase or place shares supports the inference that Hagerman knew his agreement with Yukon was terminated.

### B. Damage Issues

The issue of damages had three elements - the date of the breach, the market value of the shares on the date of the breach and the book value of the shares on the date of the breach.

#### 1. The Date of the Breach

The Eighth Circuit concluded that Yukon failed to raise an actual question as to the date of the breach since the agreement between Hagerman and Tjosvold provided "that Hagerman's option was valid only in the event of a public offering of Yukon stock". (App. A-12) Since the public offering occurred on March 28, 1985, the Eighth Circuit concluded that that was the date of the breach as a matter of law. The Eighth Circuit again drew inferences favoring the moving party rather than Yukon. The written agreement between Yukon and Hagerman provides as follows:

> This option must be exercised, if at all, in writing and prior to the commencement of any such public stock offering. If the public stock offering fails or is abandoned, then YUKON shall promptly notify HAGERMAN in writing. Within 30 days of such notice to HAGERMAN, HAGERMAN shall sell and YUKON shall buy back all of such shares at the same price.

A reasonable jury could infer that the option had to be exercised prior to the commencement of a public stock offering.

Consequently, if the stock option had been enforceable, Yukon would have had an immediate obligation to tender the shares when it received Hagerman's notice exercising the option on October 23, 1984. Thus, Yukon consistently argued that if any breach occurred, it occurred on that date and the shares should be valued as of that date as unregistered shares (at approximately $.50 a share). If a jury accepts Yukon's argument, Hagerman's damages would be decreased by $246,031.50.

**2. Market Value**

The Eighth Circuit also acted as a finder of fact in determining that Hagerman was to receive registered shares as a part of the public offering on March 28, 1985 and that the market value of those shares was appropriately calculated at $2.00 per share. The evidence offered by Yukon and the parties' "course of conduct" upon which the Eighth Circuit relied in determining liability, directly contradicts a finding that the shares were to be registered.

The written contract between Hagerman and Yukon makes no provision for the issuance of registered shares. Instead, it required that the option be exercised prior to the commencement of any public stock offering and it contained no "piggy-back" rights for Hagerman to have his shares later registered.

The prospectus and registration statements prepared by Yukon do not support the conclusion that Hagerman's shares were to be registered. If Hagerman's shares were to be registered, the prospectus would have included a heading captioned "Selling Security Holders". It did not. In fact, the registration statement contains an item entitled "Selling Security Holders" which is marked "Not Applicable". There is no provision in the registration statement for the registration of Hagerman's shares.

It should also be noted that Hagerman's October 23, 1984 correspondence purporting to exercise the option suggested using book value as of September 30, 1984, a date well before any of Yukon shares could have been registered and sold. Hagerman's letter goes on to indicate that "as soon as the number of shares and the price per share is provided to the undersigned, immediate payment will be made". This correspondence constitutes compelling evidence that Hagerman

understood that he was to receive unregistered shares issued prior to the public offering.

The Eighth Circuit stated that the only evidence before the lower court was the fair market value of registered shares. That statement is incorrect. Yukon had argued that the shares should be valued as of October 23, 1984, several months before the public offering, and had supplied the affidavit of an expert witness, Randall R. Heiner, which supported the valuation of the shares as of October, 1984, as unregistered shares.

The Eighth Circuit also ignored the factual dispute between the parties with respect to the effect a sale of Hagerman's shares would have had on the market value of those shares. Whether the market would have absorbed Hagerman's 164,021 shares at the public offering price of $2.00 per share is speculative at best and cannot be resolved by summary judgment. Any attempt to sell Hagerman's block of shares would have required a substantial market discount. As shown by an affidavit submitted by Hagerman's counsel, the daily volume of trading in Yukon stock during 1985 could not have accommodated 164,000 shares. The highest daily volume was 43,500 shares and most days the volume was well below 10,000 shares. Obviously, Hagerman could not have sold his shares on one day or even within several days without substantially depressing the market. This fact was acknowledged by Hagerman's counsel on oral argument to the district court:

> The practical problem here, I think, is if Hagerman has 164,000 shares of Yukon and starts to sell them, it's going to rapidly decrease the price in that stock. The last time we looked at the trades on this, which was last week, there were only 900 trades on April 9.

Since the Eighth Circuit ruled that the appropriate measure of recovery to compensate Hagerman for Yukon's breach would be to place Hagerman in the same position he would have occupied absent the breach, the Eighth Circuit's affirmance of a $2.00 per share market value is in error, since it provides Hagerman with a windfall. Again, the Eighth Circuit drew inferences in favor of the moving party.

### 3. Book Value

Finally, the Eighth Circuit affirmed the lower court's determination that the off-setting book value to be applied to market value of the stock in issue was $.23 per share, the book value prior to the public offering. Thus, Hagerman was given the double windfall of having his obligation fixed on the basis of the pre-offering book value, but Yukon's obligation fixed on the basis of the post-offering market price. Yukon presented the lower court with evidence that the influx of funds generated by the offering increased book value to approximately $.65 per share.

## CONCLUSION

The Eighth Circuit opinion imposes a substantial burden on a defendant, in response to a motion for summary judgment, to disprove the plaintiff's claim by something more than direct testimony. The court inappropriately tilted the scales of justice in favor of the plaintiff, disregarded the defendant's testimony and denied the defendant's right to a jury trial. Certiorari should be granted to clarify this critical area of civil trial practice.

Dated: May 18, 1988

Respectfully submitted,

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87-1919

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**Petition for a Writ of Certiorari to the United States Supreme Court From the Eighth Circuit Court of Appeals**

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## APPENDIX

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# United States Court of Appeals
## FOR THE EIGHTH CIRCUIT

87-5092

| | | |
|---|---|---|
| William F. Hagerman, *Appellee,* | * | |
| v. | * | Appeal from the United States District Court for the District of Minnesota |
| Yukon Energy Corporation, *Appellant,* | * | |
| and David C. Tjosvold. | * | |

**Submitted: September, 3, 1987**
**Filed: February 9, 1988**

**Before HEANEY, Circuit Judge, ROSS, Senior Circuit Judge, and WOLLMAN, Circuit Judge.**

ROSS, Senior Circuit Judge.

Appellee William F. Hagerman brought this action against David C. Tjosvold and appellant Yukon Energy Corporation for breach of contract, alleging that defendants failed to honor a stock option agreement between the parties. The district court[1] entered summary judgment on behalf of Hagerman and awarded him $290,317 in damages. Yukon appeals.[2]

For the reasons set forth below, we affirm the judgment of the district court.

[1]The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota.

[2]The district court also granted David C. Tjosvold's motion for summary judgment and dismissed him as a party. Tjosvold's dismissal is not at issue in this appeal.

**Background**

Yukon manufactures furnaces for residential and commercial use. In 1983, Yukon purchased for $100,000 certain technology regarding the development of fuel efficient furnaces. Yukon and Hagerman subsequently negotiated an agreement for the funding of the technology. Pursuant to the agreement, which was drafted by Yukon's attorney, Hagerman purchased the technology from Yukon for $150,000. Hagerman then licensed the technology back to Yukon in exchange for royalties, subject to a minimum and maximum annual payment. Under the agreement, Yukon was given the option to repurchase the technology from Hagerman within ten years for $175,000. Additionally, in the event of a public offering of Yukon stock within ten years of the agreement, Hagerman was given the option to purchase at book value shares of Yukon stock in an amount equal to 5% of the shares owned by Yukon's president, David Tjosvold.

In October, 1984, Yukon exercised its option to repurchase the technology from Hagerman. On October 23, 1984, Tjosvold delivered to Hagerman a check for $175,000, the repurchase price, and a check for $18,000 for one year's royalties. On that same day, Hagerman gave Yukon notice of his intent to exercise his stock option in the event of a public offering of Yukon stock.

In November, 1984, Yukon filed registration statements for a public offering of common stock with the Securities and Exchange Commission and the Minnesota Department of Commerce. Although the public offering was made in early 1985, Yukon never transferred shares to Hagerman. Hagerman brought this action seeking damages or specific performance of the parties' 1983 agreement.

A hearing was held on Hagerman's motion for summary judgment in April, 1986. Yukon opposed the motion by arguing that the parties had orally modified their agreement, eliminating Hagerman's stock option. Yukon further argued that in accordance with the modification, Yukon's tender of the two checks to Hagerman fulfilled all of Yukon's obligations under the agreement. After the summary judgment hearing, the district court ordered the parties to submit supplemental briefs on the issue of damages. The district court subsequently entered judgment for Hagerman.

As to Yukon's liability for breach of the stock option, the district court found that Yukon raised no genuine issue of

material fact as to whether the parties orally modified the technology agreement. The district court found that Yukon's actions subsequent to the alleged modification indicated that the agreement was not actually modified. The district court determined Hagerman's damages by figuring the difference between the contract price of the stock, as the court determined was set forth in the technology agreement, and the fair market value as of the first day of the public offering, and awarded Hagerman $290,317.

Yukon filed a motion to alter or amend judgment, and a hearing was held. The district court denied the motion without an opinion. On appeal, Yukon argues that the district court erred in granting summary judgment because Yukon raised genuine fact issues as to whether it breached the stock option provision and as to the remedy to be awarded Hagerman.

**Standard of Review**

In reviewing a district court's grant of summary judgment, this court is to apply the same standard that the district court was to have applied. *Stark v. St. Cloud State Univ.*, 802 F.2d 1046, 1048 (8th Cir. 1986). The Supreme Court recently stated that:

> [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial .... [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted

*Anderson v. Liberty Lobby, Inc.*, 106 S.Ct 2505, 2511 (1986) (citations omitted.)

In determining whether summary judgment should lie, the district court is to view the evidence in the light most favorable to the nonmoving party and give to that party the benefit of all inferences which reasonably may be drawn. *Agristor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987).

**Breach of Contract**

Yukon argues that it raised a genuine issue of material fact as to whether it breached the technology agreement, such that summary judgment should have been precluded. In particular, Yukon contends that the stock option was terminated by an accord and satisfaction when Hagerman accepted the two checks from Yukon in full satisfaction of Yukon's obligations under the technology agreement. As evidence of the accord and satisfaction, Yukon presented Tjosvold's deposition testimony in which he stated that Yukon repurchased the technology from Hagerman at Hagerman's insistence. When Tjosvold gave Hagerman the two checks, Tjosvold told him "I understand that this ends our agreement, here is your money like you wanted, like you requested before. I suppose that's it." Hagerman did not reply at the time, but negotiated the two checks. Yukon now argues that an accord and satisfaction was accomplished because Yukon made clear that the checks were in full settlement of all of Yukon's obligations, and Hagerman accepted the checks without contradiction. Consequently, Yukon asserts, the stock option was terminated.

Yukon accurately states the Minnesota law of accord and satisfaction:

> If there is an honest dispute between the parties, a tender with the explicit understanding of both parties that it is in full payment of all demands, and an acceptance by the creditor with the understanding that the tender is accepted in full payment results in accord and satisfaction. When a payment is made by check *"which is offered in full satisfaction of the debt,* retention and negotiation by the creditor, *with knowledge of all the facts,* constitutes an acceptance of the offer to settle the indebtedness * * *."

*Acton Constr. Co., Inc. v. State,* 363 N.W.2d 130, 133-34 (Minn. App. 1985) (quoting *Butch Levy Plumbing & Heating, Inc. v. Sallblad,* 267 Minn. 283, 290, 126 N.W.2d 380, 385 (1964) (emphasis in original) (citation omitted)).

The agreement constituting the accord and satisfaction need not be express, but may be "implied from circumstances which clearly and unequivocally indicate the intention of the parties." *Id.* at 133 (quoting *Roaderick v. Lull Eng'g Co., Inc.,* 296

Minn. 385, 389, 208 N.W.2d 761, 764 (1973)). In the absence of proof of an express agreement, the court is to consider the conduct of the parties. *Becker v. F & H Restaurant Group, Inc.*, 413 N.W.2d 202, 205 (Minn. App. 1987). "The supreme court has not held that an accord and satisfaction has been reached in any case where mutual agreement was lacking." *Acton, supra*, 363 N.W.2d at 133.

The district court determined, and we agree, that Yukon failed to raise a genuine issue of material fact as to whether the parties mutally agreed to terminate Hagerman's stock option.[3] In making its determination, the district court looked to the conduct of the parties and determined that, except for Yukon's breach, the parties' conduct indicated that there was not an oral modification of the contract or an accord and satisfaction. The district court found determinative certain statements made by Yukon in the prospectus and stock registration statements in which Yukon affirmed the validity of Hagerman's option.

The prospectus prepared by Yukon's attorneys and dated February 14, 1985, detailed the technology agreement between Yukon and Hagerman. The prospectus stated that Yukon had repurchased the technology and that Hagerman had informed Yukon of his intention to exercise his stock option. The prospectus continued: "Accordingly, the Company will issue up to 164,021 shares of its Common Stock to such individual at

[3]We further note that there is a question as to whether the doctrine of accord and satisfaction would apply in this case because in tendering the two checks to Hagerman, Yukon was doing no more than it was required to do under the technology agreement in order to exercise its option to repurchase the technology. "'The rule has always been clear that the mere retention by the creditor of money to which he is entitled absolutely will not amount to an accord and satisfaction although tendered or transmitted to him as payment in full of demand.'" *Acton Constr. Co., Inc. v. State*, 363 N.W.2d 130, 134, (Minn. App. 1985) (quoting *Youngstown Mines Corp. v. Prout*, 266 Minn. 450, 463, 124 N.W.2d 328, 339 (1963)). In response to this, Yukon contends that it was exercising the option only because Hagerman demanded that it do so, rather than because it had an obligation to do so under the agreement. Because we find that Yukon failed to raise a genuine factual issue as to whether the parties agreed to terminate the stock option, we need not address this issue.

approximately $.23 per share upon receipt of payment therefor."[4] Hagerman's stock option is mentioned four other times in the prospectus. Nowhere in the prospectus is there any mention that Yukon disputed Hagerman's option or that Yukon had any defenses to the exercise of the option. The prospectus was incorporated into the registration statements filed with the Securities and Exchange Commission and the Minnesota Department of Commerce. Additionally, the parties' technology agreement was listed as an exhibit to the registration statement, again without qualification and without repudiation of the validity of Hagerman's stock option.

In order to explain the statements regarding Hagerman's option, Yukon offered the affidavit of one of the attorneys who prepared the prospectus. The attorney stated that shortly before February 15, 1985 (the date of the final prospectus), Tjosvold told the attorney that he disputed the validity of Hagerman's option because of certain conversations between Hagerman and Tjosvold. However, the prospectus was written as if no dispute existed because those preparing it thought that it would be "safest" to take a "worst case" position.

Yukon objects to the district court's determination that Yukon was "estopped from denying the truth of its own statements" in the prospectus and to the district court's statement that the prospectus statements "must be taken as true." In making such determinations, the district court noted that both the Securities Act of 1933, *see* 15 U.S.C. §§ 77k, 771 and 77x (1982), and the Minnesota Uniform Securities Act, *see* Minn. Stat. Ann. §§ 80A.17 and 80A.22-23 (West 1986 & Supp. 1988), provide substantial penalties for the making of false statements

[4]The prospectus provided in part:

> The Company financed the purchase of such technology through the assignment of all of its interest in the technology to an unrelated individual in exchange for $150,000. In conjunction with such assignment, the Company received an irrevocable, exclusive 10-year license for use of the technology and a concurrent 10-year option to repurchase the technology for $175,000 and granted to such individual an option to purchase a number of shares equal to 5% of the number of shares of Common Stock of the Company held by David C. Tjosvold immediately prior to any public offering of the Common Stock of the Company, exercisable at the book value of the Company at the time of exercise. In October 1984, the Company exercised its option to repurchase the technology and the individual notified the Company of his intent to exercise his purchase option. Accordingly, the Company will issue up to 164,021 shares of its Common Stock to such individual at approximately $.23 per share upon receipt of payment therefor.

in a prospectus which accompanies a registration statement. We agree with Yukon that the statements in the prospectus and registration statements are not conclusive admissions. *See Enquip, Inc. v. Smith-McDonald Corp.*, 655 F.2d 115, 118 (7th Cir. 1981) (pleadings from another case are admissible as admissions, although they are not conclusive); *Brown & Root, Inc. v. American Home Assurance Co.*, 353 F.2d 113, 116 (5th Cir. 1965) *cert. denied*, 384 U.S. 943 (1966) (holding that "except for those specialized, rare assertions characterized as judicial admissions, a party is entitled to explain an admission and even to retract it.") However, the statements may be considered as evidence of whether there was in fact an oral modification of the parties' agreement or an accord and satisfaction.

Even considering the statements in Yukon's prospectus to be evidentiary rather than conclusive admissions, we agree with the district court that Yukon failed to establish the existence of a genuine factual issue as to whether the parties mutually agreed to terminate Hagerman's option. As noted previously, in the absence of an express agreement, a court is to look to the conduct of the parties. In this case, the evidence of the parties' conduct following the alleged accord and satisfaction consisted of Hagerman's attempt to exercise the option and Yukon's preparation of the stock prospectus in which it unequivocally affirmed the validity of Hagerman's stock option. Such conduct belies Tjosvold's assertion of a mutual agreement. Yukon presents no other evidence of conduct on its own part or by Hagerman which indicates that the parties reached a mutual agreement to terminate the written stock option. For example, Yukon presents no evidence that when Hagerman gave written notice of his intent to exercise the stock option, Yukon gave written response that it no longer considered the option to be in effect. We find that Yukon failed to create a genuine issue of material fact as to whether there was an oral modification or an accord and satisfaction. Therefore, summary judgment was appropriate.

Yukon next argues that it raised a fact question as to whether Hagerman was estopped from enforcing the stock provision by his own failure to perform an oral agreement between the parties. According to Yukon, at the time the technology agreement was entered, the parties also orally agreed that if Yukon ever had a public offering of stock of $5,000,000, Hagerman would fund it up to $2,000,000. Because Hagerman did not fund

Yukon's actual stock offering, Yukon contends that he is estopped by his own breach from enforcing the stock option.

In support of its argument, Yukon presented Tjosvold's deposition testimony that Hagerman and he had the following conversation:

> *[Hagerman] said say you have a $5,000,000 stock underwriting, how about if I put up two million of the $5,000,000 for the underwriting. I said, well, :hat sounds pretty good. He said, "Well, that's what I can do. If you need up to $2,000,000 to make sure it gets done, I have got it."*

Again, because there is no express evidence of this agreement, we look to the conduct of the parties. Yukon presented no evidence that Yukon ever approached Hagerman about funding part of Yukon's actual public offering. Additionally, as noted, the prospectus for Yukon's stock unequivocally affirmed the validity of Hagerman's option, without mentioning that Yukon disputed the option for any reason. Yukon failed to raise a genuine issue of material fact as to the question of estoppel, and therefore we affirm the order of the district court as to Yukon's breach for failing to honor Hagerman's stock option.

**Remedy**

As correctly stated by the district court, the appropriate measure of recovery to compensate Hagerman for Yukon's breach would be to place Hagerman in the same position he would have occupied absent the breach. *See Desnick v. Mast,* 311 Minn. 356, 364, 249 N.W.2d 878,883 (1976). The district court determined that this remedy should be damages, measured by the difference between the contract price of the stock which Hagerman should have received and its fair market value.

In figuring Hagerman's damages, the district court found the contract price to be set out in the technology agreement, which gave Hagerman the "option to purchase shares of Yukon equal to 5% of the share [sic] owned by David C. Tjosvold, President, at book value as determined by the accounting firm of Peat, Marwick & Mitchell." In the prospectus, Yukon stated that 5%

of Tjosvold's shares equalled 164,021 shares, and that Peat, Marwick & Mitchell had determined the book value as of the date Hagerman exercised his option to be approximately $.23 per share. *See* note 4, *supra.* Therefore, the district court figured the contract price to be 164,021 shares multiplied by $.23 per share, for a sum of $37,725.

In figuring the fair market value of the stock, the district court determined that the breach occurred on the first day Yukon stock was offered to the public, March 28, 1985. On that day, the market price for Yukon stock was $2.00 per share. Therefore, the fair market value of the 164,021 shares to be issued Hagerman was $328,042. Calculating the fair market value less the contract price, the district court determined Hagerman's damages to be $290,317.

Yukon contends that summary judgment was improperly granted with regard to Hagerman's remedy for two primary reasons. First, Yukon argues that specific performance rather than damages was the appropriate remedy in this case because Hagerman's monetary damages were too speculative. Second, Yukon contends that even if damages were the preferred remedy, the amount of Hagerman's damages should have been a jury question because of the many variables present in assessing the market value of the shares Hagerman was to have received. Central to both of these arguments is Yukon's contention that Hagerman was to have received unregistered rather than registered shares of Yukon stock. Yukon presented evidence that because of restrictions on transferability of unregistered shares, Hagerman's shares would have had a market value considerably less than the $2.00 per share awarded by the district court.[5]

In support of its argument that Hagerman's shares were to be unregistered, Yukon submitted the affidavit of John Ellingboe, one of the attorneys who helped prepare Yukon's stock prospectus. Ellingboe stated that in his opinion, Hagerman was to receive unregistered stock under the technology agreement. Yukon also submitted the affidavits of two securities experts who stated that the value of the shares Hagerman was to receive should be substantially discounted because they were unregistered.

However, a review of the record indicates that Yukon failed

[5]S.E.C. Rule 144 generally restricts the transferability of unregistered stock for a two year period. *See* 17 C.F.R. § 230.144 (1987).

to raise the issue of whether Hagerman's shares were to be registered until its motion to alter or amend judgment, made after the district court granted summary judgment for Hagerman.[6] Therefore, we consider whether the district court erred in granting Hagerman's motion for summary judgment based on the record before the district court at the time it ruled on the summary judgment motion.

At no time prior to the district court's grant of summary judgment did Yukon raise the issue that Hagerman's damages should be discounted because his shares were to be unregistered. In fact, at the summary judgment hearing, instead of arguing that Hagerman's shares were to be unregistered, Yukon's attorney informed the district court to the contrary:

> The Court: Were the shares under the agreement to have been lettered[7] in any regard?
> [Yukon's attorney]: No, Your Honor.
> The Court: So, they would have been freely disposable at that time?
> [Yukon's attorney]: Yes, Your Honor.

Subsequent to the summary judgment hearing, the parties filed supplemental memoranda regarding the issue of damages at the court's direction. Again, Yukon failed to contend that the shares were to be unregistered.[8]

The district court issued its order granting summary judgment for Yukon on October 22, 1986. On October 31, 1986, Yukon filed its notice of motion to alter or amend judgment, in which it contended for the first time that Hagerman's shares were to be unregistered. At this time Yukon also presented to the district court for the first time the Ellingboe affidavit and the two affidavits of the securities experts regarding the valuation of unregistered shares. The district court denied Yukon's motion to alter or amend judgment.

[6]We note that counsel for Yukon on this appeal did not represent Yukon in the district court proceedings.

[7]Unregistered shares are also referred to as "lettered" shares.

[8]Hagerman's supplemental memorandum regarding damages anticipated that Yukon would argue that the shares were to be unregistered, and therefore Hagerman argued to the contrary. However, in its supplemental memorandum, which was filed the same day as Hagerman's, Yukon did not raise the issue that the shares were to be unregistered.

Therefore, at the time it ruled on Hagerman's motion for summary judgment, the district court had before it only evidence of the fair market value of the shares Hagerman was to receive had they been registered. Yukon had failed to raise a genuine fact issue that the shares were to be unregistered. Therefore, the district court properly granted summary judgment for Hagerman with damages based on the value of registered shares.

The next question that arises, then, is whether the district court erred in failing to grant Yukon's motion to alter or amend judgment based on Yukon's new argument that the shares were to be unregistered. A district court has broad discretion in determining whether to grant a motion to alter or amend judgment, and this court will not reverse absent a clear abuse of discretion by the district court. *See Harris v. Arkansas Dept. of Human Serv.,* 771 F.2d 414, 416-17 (8th Cir. 1985). We find no such abuse of discretion in this case.

As the Seventh Circuit recently stated:

> "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment .... Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time."

*Rothwell Cotton Co. v. Rosenthal & Co.,* 827 F.2d 246, 251 (7th Cir.), *as amended,* 835 F.2d 710 (1987) (quoting *Keene Corp. v. International Fidelity Ins. Co.,* 561 F.Supp. 656, 665-66 (N.D. Ill. 1983), *aff'd,* 736 F.2d 388 (7th Cir. 1984). A motion to alter or amend judgment cannot be used to raise arguments which could have been raised prior to the issuance of judgment. *Federal Deposit Ins. Corp. v. Meyer,* 781 F.2d 1260, 1268 (7th Cir. 1986). *See also, Whitlock v. Midwest Acceptance Corp.,* 575 F.2d 652, 653 n.1 (8th Cir. 1978) (holding that district court properly denied plaintiffs' motion for relief of judgment based on newly submitted affidavits which tended to prove plaintiffs' allegations where the information in the affidavits had been

available prior to entry of summary judgment and plaintiffs failed to explain why the affidavits were not submitted earlier).

In the present case, Yukon does not contend that it was unable to raise the issue of the registration of the shares prior to the entry of summary judgment.[9] Nor does it assert that it was unable to present the affidavits of Ellingboe and the securities experts prior to the time it filed its motion to alter or amend judgment. Therefore, the district court did not abuse its discretion in denying Yukon's motion to alter or amend judgment.

Yukon next argues that even if the shares were to be registered, it raised genuine fact issues as to the date of Yukon's breach of the stock provision and as to the book value to be assigned to Hagerman's shares. With regard to the date of the breach, Yukon argues that the breach occured on October 23, 1984, the date Hagerman notified Yukon of his intent to exercise the stock option. Yukon asserts that this affects Hagerman's damages, because the market price of Yukon stock on October 23, 1984, was approximately 50 cents a share. However, as the district court properly noted, the technology agreement provided that Hagerman's option was valid only in the event of a public offering of Yukon stock. The public offering occurred on March 28, 1985, at which time the fair market value of the stock was $2.00 per share. We agree that Yukon failed to raise a factual question as to the date of the breach.

Yukon also argues that it raised a fact question as to the book value of the stock. The prospectus simply provided that Yukon was to sell the shares to Hagerman at book value as determined by the accounting firm of Peat, Marwick & Mitchell. The agreement did not say which date was to be considered in determining book value. In finding a book value of $.23 per share, the district court relied on Yukon's statements in its prospectus in

[9]In its memorandum in support of its motion to alter or amend judgment, Yukon argued that it had not previously had the opportunity to address Hagerman's damages with regard to a March, 1985 date of breach, thereby impliedly arguing that it did not have the opportunity to argue whether the shares were to be registered. Yukon's position prior to its motion to alter or amend judgment had been that the breach occurred in October, 1984, before any of the shares were registered. However, at the summary judgment hearing, Hagerman argued that the breach occurred at the earliest on March 28, 1985, the first day Yukon stock was offered to the public. Additionally, the district court at the summary judgment hearing specifically asked Yukon's attorney whether Hagerman's shares were to be registered. Therefore, Yukon had ample opportunity to raise the issue of the registration of Hagerman's shares prior to the district court's entry of summary judgment.

which it stated that Hagerman had the option to purchase the shares "exercisable at the book value of the Company at the time of exercise." *See* note 4, *supra*. The prospectus continued that in October, 1984, Yukon stock had a book value of $.23 per share.

Yukon now argues that the book value of the shares ought to be determined as of the date of the breach. Yukon argues that the prospectus showed that as of the date of the breach, March 28, 1985, the book value of the stock was $.65 per share. However, a review of the prospectus shows that Yukon's argument is without merit. The figure asserted by Yukon to be the stock's book value as of March 28, 1985, is actually listed in the prospectus as the "pro forma net tangible book value after offering," figured as of September 30, 1984. This figure represents the amount of Yukon's total tangible assets less its total tangible liabilities, giving effect to issuance of 1,000,000 shares of Yukon stock at $2.50 per share, as of September 30, 1984. Thus, this figure does not accurately reflect the actual book value of the stock as of the date of the breach. Yukon failed to offer any other evidence as to the stock's book value. Therefore, the district court did not err in granting summary judgment on this issue.

**Conclusion**

For the foregoing reasons, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**
**FOURTH DIVISION**
**Civil No. 4-85-960**

William F. Hagerman

vs. Order

Yukon Energy Corp., et al.

George R. Serdar and Steven E. Antolak, BOWMAN & LONDON, LTD., St. Paul, Minnesota, for plaintiff.
Lawrence T. Hofmann, ROBINS, ZELLE, LARSON & KAPLAN, Minneapolis, Minnesota, for defendants.

In this action, plaintiff William Hagerman (Hagerman) contends defendants Yukon Energy Corporation (Yukon) and David Tjosvold (Tjosvold) breached a stock purchase option agreement allegedly entered into among the parties. Plaintiff is a Florida citizen, defendants are Minnesota citizens, and the amount in controversy exceeds $10,000. The jurisdiction of the Court is properly invoked pursuant to 28 U.S.C. 1332.

The matter is before the Court on defendant Tjosvold's motion for summary judgment, and on plaintiff's cross-motion for summary judgment. A hearing was held on April 14, 1986. Based on the files, records, and proceedings herein, each motion is granted.

**Facts**

Defendant Yukon designs, manufactures and sells furnaces for residential and light commercial use. Defendant Tjosvold is Yukon's president. In the early 1983, for the sum of $100,000, Yukon purchased oil condensing furnace technology which permitted it to create a 95% efficient furnace.

To fund and develop this technology, Yukon entered into a technology agreement with Hagerman on November 17, 1983. Tjosvold signed the agreement on Yukon's behalf. The agreement provided that Hagerman was to purchase the oil con-

densing furnace technology from Yukon for $150,000. The $50,000 additional sum realized in this sale was to be used to complete development of the technology. Yukon retained, for 10 years, the right to repurchase the technology for $175,000, and the right to use the technology in the production and sale of its furnaces. Hagerman was to receive a ten dollar royalty for each furnace sold, subject to a guaranteed minimum annual payment of $18,000 and a maximum annual payment of $40,000.

Yukon, in the same agreement, granted Hagerman an irrevocable and exclusive option to purchase shares of Yukon's stock, should Yukon carry out a public stock offering. The number of shares Hagerman could purchase under the option was equal to five percent of the shares owned by Tjosvold, who at the time of the agreement was Yukon's sole shareholder. This stock purchase option was to be exercised in writing prior to commencement of any stock offering.

When, on October 23, 1984, Yukon repurchased the furnace technology from Hagerman for $175,000 and paid him $18,000 in royalties, Hagerman notified Yukon, in writing, of his intention to exercise the stock purchase option granted to him in the technology agreement. Although Yukon made a public stock offering in March, 1985, it has not transferred shares to Hagerman.

Hagerman instituted this action against defendants in August, 1985, alleging breach of contract and seeking either specific performance, damages or injuctive relief. Plaintiff has now brought this summary judgment motion on his breach of contract claim. Defendant Tjosvold's cross motion seeks a declaration that he is not liable to Hagerman because his signature on the November, 1983, stock option agreement was in his corporate, not personal, capacity.

**Discussion**

In analyzing this case, the court has clearly in mind the directive that a party is not entitled to summary judgment unless no genuine issue exists as to any material fact. Rule 56(c) of the Federal Rules of Civil Procedure. If the evidence is such that a reasonable jury could not return a verdict for the non-moving party, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510, 2511 (1986). Although the

movant has the burden of showing there is no genuine issue of fact, the non-movant must set forth specific facts showing there is a genuine issue for trial; he may not rest upon the mere allegation or denials of his pleading. *Id.* at 2514. In considering a summary judgment motion, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 2513.

I. Defendant Tjosvold's motion for summary judgment

Defendant Tjosvold has moved for summary judgment claiming he is not liable under the technology agreement because he was not, personally, a party to that contract. Rather, he claims he entered into that agreement as president of Yukon on its behalf. Plaintiff, in his supplementary memorandum, admits that Tjosvold is not personally bound by the technology agreement nor is he obligated for any damages to which plaintiff may be entitled. In light of plaintiff's admissions, Tjosvold's motion for summary judgment is granted. Tjosvold is dismissed as a party.

II. Plaintiff's motion for summary judgment

A. Breach of Contract

Plaintiff contends he is entitled to summary judgment because Yukon breached the agreement in failng to honor his stock option. Yukon replies that subsequent to the agreement's execution, it was orally modified, voiding plaintiff's stock purchase option. Specifically, defendant states that after the technology agreement was executed, the personal relationship between plaintiff and Tjosvold deteriorated markedly. Defendant claims that in mid-1984, plaintiff, professing a lack of confidence in Tjosvold and Yukon, declared he no longer wished to be associated with Yukon and stated if the funds called for by the agreement were paid to him, he would terminate the agreement and each party could walk away from it. Defendant claims that by paying plaintiff the repurchase price for the technology and the royalties, the agreement, including the stock purchase option, was no longer in effect.

Minnesota law clearly allows the subsequent oral modification of a written contract not within the statute of frauds.[1] *New*

[1]The parties do not claim this contract is within the statute of frauds nor does it appear to be covered by the statute. See, J. Calamari & J. Perillo, *The Law of Contracts* 672, 673 (2d ed. 1977).

*Amsterdam Casualty Co. v. Lundquist,* 293 Minn. 274, 288 n.5, 198 N.W.2d 543, 551 n. 5 (1972); *Mitchell v. Rende,* 225 Minn. 145, 148, 30 N.W.2d 27, 30 (1947). Such modification requires no new consideration if it is made when the contract is still executory and there has been no breach, since the consideration from the original contract attaches to and supports the modified contract. *Mitchell,* 225 Minn. at 149, 30 N.W.2d at 30; *Asbestos Products v. Healy Mech. Contractors,* 306 Minn. 74, 76, 235 N.W.2d 807, 809 (1975). Although parties may expressly modify a contract without new consideration, it must be established that such an agreement was in fact made. See, *Cambern v. Hubbling,* 307 Minn. 168, 171, 238 N.W.2d 622, 624 (1976).

In this case, it is Yukon's word against plaintiff's that the contract at issue was orally modified. Plaintiff denies the modification. Such a factual dispute would normally preclude summary judgment. But the facts of this case bear further scrutiny. Here, all of defendant's actions subsequent to the alleged contract moidification (save and except only its breach thereof) indicate that the contract was not, in fact, modified.

Yukon's actions show its own belief in the validity of the stock option agreement. In conjunction with Yukon's public offering of stock, it submitted registration statements to the Minnesota Department of Commerce and the United States Securities and Exchange Commission. The company appended the technology agreement to both statements with no indication of any kind that the stock purchase option had lapsed, was void, or was otherwise disputed by the parties.

In addition, the prospectus dated February 14, 1985, describing Yukon's offering, is replete with references to plaintiff's stock purchase option. There is no repudiation or qualification stated. For example, on page 10 of the prospectus, Yukon indicates how the technology for its furnaces was funded, specifically describing the technology agreement:

> The Company financed the purchase of such technology through the assignment of all of its interest in the technology to an unrelated individual in exchange for $150,000. In conjunctin with such assignment, the Company received an irrevocable, exclusive 10-year license for use of the technology and a concurrent 10-year option to repurchase the technology for $175,000 and granted to

such individual an option to purchase a number of shares equal to 5% of the number of shares of Common Stock of the Company held by David C. Tjosvold immediately prior to any public offering of the Common Stock of the Company, exercisable at the book value of the Company at the time of exercise. *In October 1984, the Company exercised its option to repurchase the technology and the individual notified the Company of his intent to exercise his purchase option. Accordingly, the company will issue up to 164,021 shares of its Common Stock to such individual at approximately $.23 per share upon receipt of payment therefore.* (Emphasis added.)

At pages 30 and 31 of the prospectus, the above passage is essentially repeated. In addition, pages 3 and 4 of the prospectus reference the stock option held by plaintiff.

Yukon's assertion that the technology agreement has been modified is inconsistent with the information contained in its prospectus filed with federal and state securities regulation agencies. Both the Federal Securities Act of 1933, 15 U.S.C. 77j, *et seq.*, and the Minnesota Uniform Securities Act, Minn. Stat. 80A.17, *et seq.*, prohibit false statements in prospectus accompanying securities registration statements and provide for penalties if such statements are included.

The Court holds that Yukon, having averred the existence of Mr. Hagerman's option while obtaining the benefits of the securities laws, is estopped from denying the truth of its own statements. Securities registration documents are prepared so that the public may rely on the company's veracity. The company has obtained the advantages which flow from that reliance. Yukon will not now be heard to claim a second advantage by asserting that its own statement is a lie.

The statements, filed by Yukon on its own behalf, must be taken as true. Therefore, based upon defendant's own assertions, the Court finds that the technology agreement has not been orally modified. Yukon has breached the technology agreement by failing to honor plaintiff's stock purchase option. Summary judgment is granted.

B. Damages

In granting summary judgment, the Court must determine

the monetary damages adequate to compensate plaintiff for Yukon's breach. The appropriate measure of recovery will place plaintiff in the position he would have occupied absent the breach. *Desnick v. Mast*, 311 Minn. 356, 364, 249 N.W.2d 878, 883 (1976). The parties agree that this amount is to be measured by the difference between the contract price for the stock at issue and its fair market value. (See, Defendants' Memorandum, at 2, and Plaintiff's Memorandum, at 7 and 8.) The parties do not agree, however, as to the numbers associated with those values.

Despite the parties' disagreement, the technology agreement itself sets the contract price for the stock. Plaintiff was authorized to purchase 5% of the shares owned by Tjosvold; the cost of those shares was book value as determined by the accounting firm of Peat, Marwick & Mitchell. (See, Paragraph 9, technology agreement). On page 10 of Yukon's prospectus dated February 14, 1985, (quoted above), filed in conjunction with its public offering of stock, it is indicated that five percent of the shares owned by David Tjosvold equals 164,021 shares. Book value of those shares is approximately 23 cents. Therefore the contract price for the shares available to plaintiff is 164,021 x $.23 = $37,725.

Yukon contends the fair market value of its stock should be assessed as of the date it breached the stock purchase option agreement. Defendant contends the breach occurred on October 23, 1984, the date plaintiff notified Yukon of his intention to exercise the stock purchase option. Yukon has valued its stock as of that date at no more that 50 cents per share.

The Court does not accept Yukon's assessment. Plaintiff notified Yukon of his intention to exercise his stock purchase option on October 23, 1984. Yukon was not obligated to sell its stock until its public offering. This occurred on March 28, 1985. Therefore, the Court finds that Yukon's breach occurred on March 28, 1985, when it declined to issue its shares to the plaintiff. The fair market value of Yukon's stock must be valued as of that date.

On March 28, 1985, the market absorbed Yukon's stock at $2.00 per share. The fair market value of the stock option is 164,021 x $2.00 = $328,042. Subtracting from that sum the contract price of the stock option yields the damages for defen-

dant's breach of contract. That is, $328,042 - $37,725 = $290,317.[2]

Plaintiff suggests the fair market value of the stock should be the $4.00 per share price attained on July 11, 1985 (its highest market price). He argues that valuing the stock in this manner gives him the benefit of any profit lost as a result of defendant's breach. The Court rejects this suggestion.

According to Minnesota law, "damages in the form of lost profits may be recovered where they are shown to be the natural and probable consequences of the act or omission complained of and their amount is shown with a reasonable degree of certainty and exactness." *Cardinal Consulting Co. v. Circo Resorts*, 297 N.W.2d 260, 266 (Minn. 1980); *Edling v. Stanford TP.*, 381 N.W.2d 881, 884 (Minn. App. 1986). The controlling principle is that speculative, remote or conjectural damages are not recoverable. *Cardinal*, 297 N.W.2d at 267.

The Court concludes that the measure of damages cannot be assessed taking into account plaintiff's lost profits. To award plaintiff recovery for lost profits would necessarily presuppose that plaintiff had accurately guessed the precise date and instant Yukon's shares would reach their market high. The Court would then have to conclude that plaintiff would have sold the stock on that date, and that the market could have instantly absorbed his 164,021 shares. This the Court cannot do. The fair market value of the stock will be assessed as of March 28, 1985, when Yukon was obligated to transfer its stock to plaintiff.

C. Attorneys Fees

Plaintiff seeks to recover attorney's fees as a result of instituting this action. In general, "attorney's fees are not recoverable in litigation unless there is a specific contract permitting it [sic] or a statute authorizing such recovery." *Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 79 (Minn. 1981). In this case, the technology agreement makes no provision for the recovery of attorney's fees nor is there a statute providing for such recovery. Attorney's fees will not be awarded to plaintiff.

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[2]Pursuant to Minn. Stat. 549.09, plaintiff is entitled to interest on this sum as computed by the Clerk of Court in accordance with Minn. Stat. 549.09, subd. 1(c) from the time of commencement of the action until judgment is entered.

For the reasons set forth above, IT IS ORDERED that:

1. Defendant David Tjosvold's motion for summary judgment is granted. David Tjosvold is dismissed as a party.

2. Plaintiff's motion for summary judgment is granted. Defendant Yukon Energy Corporation must pay plaintiff $290,317.00, plus interest in accordance with Minnesota Statute 549.09.

3. Plaintiff's request for attorney's fees is denied.

4. Judgment having been entered on the plaintiff's behalf, he is awarded his costs.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 21st, 1986

*/s/ James M. Rosenbaum*

JAMES M. ROSENBAUM
United States District Judge

**Rule 56. Summary Judgment**

**(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

**(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

**(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(d) Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy; and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is compe-

tent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

**(f) When Affidavits are Unavailable.** Should it appear from affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

**(g) Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

## AGREEMENT

WHEREAS, Yukon Energy Corporation (Yukon) of 9890 Highway 65, Blaine, Minnesota, is a Minnesota corporation manufacturing and selling residential and commercial furnaces, and

WHEREAS, YUKON entered into an agreement dated August 19, 1983, with the Wayne Home Equipment Division of Scott & Fetzer Company, Fort Wayne, Indiana, concerning an option to purchase certain oil fired and gas fired condencing mode furnace technology (hereinafter the TECHNOLOGY), and

WHEREAS, YUKON is conducting research and development presently on the TECHNOLOGY and is investigating the patent rights, if any, which may be available upon the TECHNOLOGY, and

WHEREAS, William F. Hagerman (hereinafter HAGERMAN) of 9651 Naples St., N.E., Blaine, Minnesota, is an individual who desires to invest in the TECHNOLOGY, and

WHEREAS, YUKON desires to manufacture and market furnaces using the TECHNOLOGY, and

WHEREAS, the parties know and understand that the purchase and development of the TECHNOLOGY is a speculative venture and that the investor's money is at risk,

NOW THEREFORE the parties agree:

1. That for the purpose of this agreement HAGEMAN shall have the right to form a corporation to carry out the agreement in his place provided that HAGERMAN shall give timely notice to YUKON of his choice to form such a corporation; that the corporation shall be in good standing in the state in which it is formed; and that the corporation shall be expressly bound to, and shall be authorized to, carry out the rights and duties of HAGERMAN under this agreement.

All references to HAGERMAN hereafter include any corporation formed under this paragraph.

2. That in consideration of their mutual covenants, and the payment of One Hundred Fifty Thousand and no/100 ($150,000.00) Dollars by HAGERMAN to YUKON, receipt of which is acknowledged, YUKON assigns to HAGERMAN all of its right, title and interest to the TECHNOLOGY, the prototype

furnaces using that TECHNOLOGY, the warranties, and the patent rights, if any, arising under the option agreement of August 19, 1983.

3. That YUKON expressly retains the right to make its own good faith determination whether to exercise its option on or before the date of December 1, 1983. If YUKON determines not to exercise the option it shall promptly notify HAGERMAN. This agreement shall then become void and both parties shall be restored, to the extent possible, to their position prior to the execution of this agreement.

4. That between these parties HAGERMAN shall bear the cost and expense of research and development of the TECHNOLOGY not to exceed Fifty Thousand and no/100 ($50,000.00) Dollars.

5. That HAGERMAN grants to YUKON for 10 years the exclusive license to United States patents, if any, arising in connection with that TECHNOLOGY; to make, use and sell furnaces using the patents and TECHNOLOGY; and to license or assign its rights as licensee to others throughout the World.

6. That for a period of 10 years from the date of this agreement YUKON shall pay to HAGERMAN a royalty of Ten and no/100 ($10.00) Dollars upon each furnace sold by it or its licensees using the TECHNOLOGY. The royalties in any calendar year shall not be less than Eighteen Thousand and no/100 ($18,000.00) Dollars nor greater than Forty Thousand and no/100 ($40,000.00) Dollars regardless of the number of furnaces sold, and in the event that YUKON exercises its option herein to purchase the TECHNOLOGY all such royalty payments shall cease.

7. That for a period of 10 years HAGERMAN grants to YUKON an exclusive and irrevocable option to buy all of HAGERMAN's right, title and interest in the TECHNOLOGY for the sum of One Hundred Seventy-five Thousand and no/100 (175,000.00) Dollars. The option shall be exercised, if at all, in writing with the terms of payment to be determined by the parties in good faith.

8. That in the event that David C. Tjosvold, President of Yukon Energy Corporation, shall die during the 10-year option period that event shall be deemed an exercise of the option by YUKON to purchase the TECHNOLOGY the agreed price of One Hundred Seventy-five Thousand and no/100 ($175,000.00) Dollars payable to HAGERMAN.

9. That in the event that YUKON shall decide to carry out a public stock offering within 10 years of this agreement, then YUKON grants to HAGERMAN an irrevocable and exclusive option to purchase shares of Yukon equal to 5% of the share owned by David C. Tjosvold, President, at book value as determined by the accounting firm of Peat, Marwick & Mitchell.

This option must be exercised, if at all, in writing and prior to the commencement of any such public stock offering. If the public stock offering fails or is abandoned then YUKON shall promptly notify HAGERMAN in writing. Within 30 days of such notice to HAGERMAN, HAGERMAN shall sell and YUKON shall buy back all of such shares at the same price.

10. Except as otherwise herein provided, this agreement shall be binding upon the parties, their successors, heirs, devisees, legal representatives, executors and assigns.

11. All questions with respect to the construction of this agreement and the rights and liabilities of the parties shall be determined in accordance with Minnesota law.

12. Any controversy arising under or out of this agreement and any amendments hereto, shall be determined by arbitration in Minneapolis, in connection with the Rules of the American Arbitration Association.

Dated: _____, 1983.

YUKON ENERGY CORPORATION
By */s/ David C. Tjosvold*
Its *President*

*/s/ William F. Hagerman*
William F. Hagerman

(3)

No. 87-1919

Supreme Court, U.S.
FILED
JUN 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

October Term, 1987

YUKON ENERGY CORPORATION,
*Petitioner,*

vs.

WILLIAM F. HAGERMAN,
*Respondent.*

On Petition for a Writ of Certiorari
to the United States Supreme Court
From the Eighth Circuit Court of Appeals

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Is entry of summary judgment in favor of the respondent proper to secure the just, speedy, and inexpensive determination of an action when the respondent has proved that petitioner's pleadings and affidavits have not raised a genuine issue of material fact and that respondent is entitled to judgment as a matter of law?

## PARTIES TO THE PROCEEDING

Petitioner:

Yukon Energy Corporation

Respondent:

William F. Hagerman

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IN THE

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YUKON ENERGY CORPORATION,
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vs.

WILLIAM F. HAGERMAN,
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On Petition for a Writ of Certiorari
to the United States Supreme Court
From the Eighth Circuit Court of Appeals

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# RESPONDENT'S BRIEF IN OPPOSITION

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## BRIEF IN OPPOSITION

Respondent William Hagerman prays that the Supreme Court of the United States deny petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered and filed in this action on February 9, 1988.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit affirming the order of the District Court is reported

at 839 F.2d 407 and is reprinted in Appendix A to the Petition for a Writ of Certiorari. The order of the United States District Court for the District of Minnesota is contained in Civ. No. 4-85-960 (Dist. Minn. October 21, 1986) and is reprinted in Appendix B to the Petition for a Writ of Certiorari.

## STATEMENT OF JURISDICTION

Respondent agrees with the petitioner's Statement of Jurisdiction.

## RULE INVOLVED

This case involves the application of Rule 56 of the Federal Rules of Civil Procedure. The rule provides in pertinent part:

> (c) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> . . .
>
> (e) When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

## STATEMENT OF THE CASE

The district court entered summary judgment in favor of William Hagerman against Yukon Energy Corporation. The essential allegations of the Complaint were admitted in public documents submitted to the United States Securities and Exchange Commission and the Minnesota Department of Commerce pursuant to a public offering of stock by Yukon Energy Corporation.

The District Court held that the petitioner failed to demonstrate the existence of a genuine issue of material fact which would preclude summary judgment and that Hagerman demonstrated he was entitled to judgment as a matter of law. On appeal by the petitioner, the Eighth Circuit Court of Appeals reexamined the evidence presented to the district court and also concluded that the petitioner failed to raise a genuine issue of material fact. Petitioner now asks the Supreme Court of the United States to make yet another evaluation of the evidence in this case by way of Petition for Certiorari.

### A. Factual Basis For Summary Judgment.

Yukon Energy Corporation manufactures furnaces for residential and commercial use. In 1983, petitioner purchased certain technology to develop fuel efficient furnaces. Yukon and Hagerman subsequently negotiated an agreement to fund the development of that technology. Pursuant to the agreement, drafted by Yukon's attorney, Hagerman purchased the technology from Yukon Energy Corporation for $150,000 and licensed the technology back to Yukon. The technology agreement required Yukon to pay royalties to Hagerman annually, subject to minimum and maximum

payments. Yukon was given the option to repurchase the technology from Hagerman within ten years for $175,000. In the event of a public offering of Yukon stock within ten years of the agreement, Hagerman was given the option to purchase Yukon stock at book value in an amount equal to five percent of the shares owned by Yukon's president, David Tjosvold.

On October 23, 1984, Yukon exercised its option to repurchase the technology from Hagerman. Yukon delivered to Hagerman a check for the repurchase price of $175,000. In addition, Yukon delivered to Hagerman a check for $18,000 as the first year's royalties. On the same day, Hagerman gave Yukon written notice of his intent to exercise his stock option in the event of a public offering of Yukon stock.

On November 16, 1984, Yukon Energy Corporation filed its prospectus and registration statement for a public offering of its common stock with the Securities and Exchange Commission. A similar filing was made with the Minnesota Department of Commerce. The prospectus and registration statements stated the terms and conditions of the technology agreement between Yukon and Hagerman. In fact, the technology agreement was attached to the registration statements as an exhibit in the appendix.

The registration statements stated that Yukon had repurchased the technology from Hagerman. The statements also affirmed the fact that William Hagerman had exercised his option to purchase Yukon stock, calculated the number of shares subject to the option, declared the price per share, and promised to transfer the stock to William Hagerman.

Petitioner described the technology agreement with Hagerman on page 10 of the Yukon Energy Corporation prospectus. The passage is worth quoting in its entirety:

> Technology employed in the production of the oil and gas models of the Ultima-Ex 95 TM was purchased in November of the 1983 from the Wayne Home Equipment Division of the Scott & Fetzer Company ("Wayne Home"). The company financed the purchase of such technology through the assignment of all of its interest in the technology to an unrelated individual [William Hagerman] in exchange for $150,000. In conjunction with such assignment, the company received an irrevocable, exclusive 10-year license for the use of the technology and a concurrent 10-year option to repurchase the technology for $175,000 and granted to such individual an option to purchase a number of shares equal to five percent of the number of shares of Common Stock of the Company held by David C. Tjosvold immediately prior to any public offering of the Common Stock of the Company, exercisable at the book value of the company at the time of the exercise. In October, 1984, the Company exercised its option to repurchase the technology and the individual notified the Company of his intent to exercise his purchase option. Accordingly, the Company will issue up to 164,021 shares of its Common Stock to such individual at approximately $.23 per share upon receipt of payment therefor.

(See Prospectus, page 10, Appellant's Appendix to Appeal to the United States Court of Appeals for the Eighth Circuit, p. 63.) Similar passages describing the technology agreement and the effect of William Hagerman's exercise of his stock option were printed in other parts of the same prospectus.

On February 4, 1985, Yukon Energy Corporation filed its final registration statement with the Securities and Ex-

change Commission and the Minnesota Department of Commerce. All of the statements describing the agreement with William Hagerman and promising performance of the stock option were repeated in this amended set of documents without change. On February 14, 1985, Yukon began circulating its prospectus for the public offering of common stock. Despite the numerous acknowledgements of the existence of William Hagerman's contract and repeated statements promising performance contained in the prospectus filed with the SEC and the Minnesota Department of Commerce and circulated to the general public, Yukon Energy conducted a successful public offering of common stock without honoring the Hagerman stock option.

By August, 1985, Yukon had been conducting its public offering of common stock for nearly six months. It became clear that Yukon Energy Corporation had no intention of honoring Mr. Hagerman's stock option agreement. On August 1, 1985, Mr. Hagerman commenced an action in the United States District Court to enforce his rights.

In the ensuing months, William Hagerman conducted his discovery. Hagerman's motion for summary judgment was heard before Judge James M. Rosenbaum on April 14, 1986.

**B. The District Court's Summary Judgment.**

The motion for summary judgment was primarily based on the substantial admissions made by Yukon in its Answer to the Complaint, the admissions in Yukon's documents filed in connection with its public offering of stock, and its conduct subsequent to William Hagerman's exercise of the stock option.

Yukon opposed the motion, submitting briefs in opposi-

tion on the merits. Yukon made no request for a stay of consideration of the motion to conduct additional discovery or to otherwise develop facts in support of its defense to the summary judgment motion.

In defense against Hagerman's motion for summary judgment, Yukon asserted that the technology agreement had been modified so that Yukon Energy Corporation was no longer obligated to honor the stock option. The only evidence brought forth by Yukon Energy Corporation in opposition to Hagerman's motion for summary judgment was the verbal assertions of David Tjosvold, Yukon Energy Corporation's president, made subsequent to commencement of suit against Yukon Energy Corporation by Hagerman. Yukon Energy Corporation offered no other evidence in support of its pleadings.

After hearing the arguments on Hagerman's motion for summary judgment, the district judge indicated his intent to make a ruling on the issue of liability. The court expressed some difficulty in determining what relief should be granted in the event liability were established by the motion for summary judgment. The court requested a conference with the attorneys to discuss appropriate relief, if any was to be awarded, and the possibility of stipulating to the relief to be awarded.

When the attorneys for the parties could not agree on the damages issue, the court ordered the parties to prepare additional briefs on the issue of damages. Both parties submitted briefs to the district court on the appropriate measure and calculation of damages to be awarded to William Hagerman in the event the court found Yukon Energy Corporation responsible for breach of its agreement with Hagerman. The memorandum regarding damages submitted

by Yukon made no objection to an award of monetary damages in lieu of specific performance or other relief. In fact, Yukon argued its own theory of calculation of damages. Petitioner failed to request a stay or any other relief necessary to develop facts or evidence in support of its opposition to the motion for summary judgment.

The district court considered the memoranda and evidence submitted by the parties on liability and the separate memoranda submitted by the parties regarding the proper measure of damages. The district court ruled that William Hagerman was entitled to judgment as a matter of law. The judgment was based on the substantial admissions made by Yukon in its Answer to the Complaint, Yukon's admission in the documents filed in connection with its public offering of common stock, and its conduct subsequent to William Hagerman's exercise of his stock option. The district court entered judgment in favor of William Hagerman by applying the measure of damages proposed by Yukon in its memorandum of damages to the stock prices and volumes contained in Yukon's documents filed in connection with its public offering of common stock.

### C. The District Court's Reconsideration of Judgment.

After the district court directed that judgment be entered in favor of Hagerman, Yukon brought a motion under Rule 59 of the Federal Rules of Civil Procedure requesting the court to reconsider its entry of judgment. For the first time in the entire proceeding, Yukon claimed that the issue of damages was not one properly resolved by summary judgment. Yukon submitted additional affidavits to the court attempting to demonstrate the existence of a genuine issue of material fact. Yukon argued that judgment, if any,

should be rendered for specific performance. Yukon also attempted to argue that the new affidavits submitted to the district court raised genuine issues of material fact as to liability. The district court denied Yukon's motions without opinion.

### D. The Decision of the Eighth Circuit Court of Appeals.

On appeal, the Eighth Circuit Court of Appeals re-examined all the evidence submitted to the district court. The court ruled that the admissions made by Yukon Energy Corporation in its prospectus and registration statement for the public offering of its common stock were not conclusive admissions. However, the court also found that petitioner had failed to set forth specific facts showing that there existed a genuine issue of material fact for trial. Accordingly, the Eighth Circuit Court of Appeals affirmed the district court's decision.

On Petition for Writ of Certiorari to the Supreme Court of the United States, petitioner again requests that the Court review the evidence submitted and reviewed by the district court and court of appeals and determine whether or not Yukon raised a genuine issue of material fact.

## REASONS FOR DENYING THE WRIT

### A.

### The Decision of the Eighth Circuit Court of Appeals is in Accord With This Court's Decisions.

In its Petition for Writ of Certiorari, Yukon Energy asserts that the decision of the Eighth Circuit Court of Appeals is not in accord with this court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). However,

the question addressed by this court in that case does not bear directly on the outcome of the case at bar. Moreover, to the extent that *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), does apply, the Eighth Circuit Court of Appeals has rendered its decision in accord with that case.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) was a defamation case. The district court had granted summary judgment to petitioners on the ground that respondents were limited purpose public figures and that the "convincing clarity" standard of *New York Times Company v. Sullivan*, 376 U.S. 254 (1964) was met by respondents. The district court held that a reporter's thorough investigation and research and his reliance on numerous sources precluded a finding of actual malice. Thus, the district court granted the motion and entered judgment in favor of the petitioners.

The Court of Appeals reversed the judgment of the district court on 9 of the 21 defamatory statements pleaded in the Complaint. The Court of Appeals held that, for purposes of summary judgment, the requirement that actual malice be proved by clear and convincing evidence rather than by a preponderance of the evidence, was irrelevant. To defeat summary judgment, the respondents (plaintiffs) did not have to show that a jury could find actual malice with "convincing clarity". The court based its conclusion on its perception that to impose a greater evidentiary burden at summary judgment "would change the threshold summary judgment inquiry from a search for a minimum fact supporting plaintiff's case to an evaluation of the weight of those facts and '[it would seem] of the weight of at least the defendant's uncontroverted facts as well." 241 U.S. App.

D.C. at 253, 746 F.2d at 1570, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

This Court's inquiry focused on whether the court of appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in defamation cases need not be considered for the purposes of a motion for summary judgment. That specific question has no relevance to the case at bar. The questions presented in the case at bar are those of an ordinary civil case, not requiring the application of different standards of proof. As a consequence, the holding of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), has limited application to the case at bar.

This Court examined the role of the judge in deciding motions of summary judgment in *obiter dictum*. This Court said:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly submitted motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

*Id.* at 247-248.

This Court went on to observe that "at the summary judgment stage the judge's function is not himself to weigh the evidence to determine the truth of the matter but to

determine whether there is a genuine issue for trial" and that this focus is suggested in Rule 56 itself. *Ibid.* The Court stated: "The inquiry performed is the threshold inquiry of determining whether there is a need for trial—whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may be reasonably resolved in favor of either party." *Id.* at 250.

In dealing specifically with how a judge is to make the determination of summary judgment, the Court stated at page 252:

> [W]e are convinced that the inquiry involved in a ruling on a motion for summary judgment or for directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict — 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed. *Id.* at 252.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

The petitioner, having pleaded the affirmative defense of accord and satisfaction, had the trial burden to prove by a preponderance of the evidence that the parties reached such an accord and satisfaction. *Cf. Central Soya Co., Inc. v. Epstein Fisheries, Inc.*, 676 F.2d 939 (8th Cir. 1982). Hagerman produced the necessary evidence on his motion for summary judgment to demonstrate that petitioner could not meet this burden of proof.

The "onus of proof" that Yukon's affirmative defenses were based in fact fell on petitioner. The only evidence presented by the petitioner in support of its claim of an accord and satisfaction were the statements of its president, David Tjosvold, made after suit had been commenced. That scanty evidence was equivocal and contradictory, at best, constituting nothing more than a reiteration of the pleadings. Yukon presented no "specific facts" supporting petitioner's assertion of the existence of an issue of material fact. The Eighth Circuit Court of Appeals properly observed that Yukon presented no other evidence of conduct on its own part or by Hagerman (or any other evidence) which indicated that the parties reached a mutual agreement to terminate the written stock option. The Eighth Circuit Court of Appeals, by way of example, illustrated circumstances which would have precluded entry of summary judgment had such circumstances existed.

The Eighth Circuit Court of Appeals properly applied the standards for summary judgment set forth by this Court in its previous decisions. The Court determined that petitioner failed to meet its burden of production of evidence demonstrating the existence of a genuine issue of material

fact. The petitioner could not have sustained its burden of proof. This Court should not disturb the consistent decisions of the lower courts by considering the matter on Writ of Certiorari.

**B.**

**The Issue Presented by Petitioner is Unique, Unlikely to Recur, and is Too Narrow to Warrant Review by This Court on Certiorari.**

This case is truly unique. The petitioner essentially admitted the allegations of respondent's Complaint in its prospectus and registration statements for its public offering of common stock. The stock offering documents detailed the terms of the agreement with Hagerman, affirmed the fact that Hagerman had exercised the stock option, calculated the number of shares subject to the option, declared the price per share to Hagerman, and promised to transfer the stock to Hagerman. It is highly unusual that any party would make such detailed admissions in a document subject to the severe criminal and civil penalties of federal and state securities laws.

The circumstances presented by petitioner are unlikely to recur. The issue presented by petitioner is too narrow and specific to these anomalous circumstances to warrant review by this Court on certiorari. It can arise only in those cases where defendant has admitted the specific allegations of plaintiff's complaint in a liability document and failed to present any evidence to the court demonstrating its asserted defenses are anything more than verbal, unsupported denials of liability. This case has no broad impact on the use of summary judgment because the basis of the judgment in the lower courts is that petitioner failed to demonstrate

the existence, in these specific circumstances, of a genuine issue of a material fact for trial.

The district court reviewed the prospectus and stock option documents of Yukon Energy Corporation, the documentary evidence submitted by William Hagerman, the conduct of the parties subsequent to Hagerman's exercise of the stock option, and Yukon's verbal denials of liability. The district court entered judgment for William Hagerman, holding that Yukon Energy Corporation failed to raise a genuine issue of material fact in these specific circumstances. The district court reconsidered the entire record and considered additional evidence submitted by petitioner on the motion to reconsider judgment, and reaffirmed entry of summary judgment. The Eighth Circuit Court of Appeals considered the entire record on appeal and applied the same standard that the district court was to have applied in reviewing the district court's grant of summary judgment. *Hagerman v. Yukon Energy Corporation,* Petitioner's Appendix A-3. The court of appeals also found that petitioner failed to raise a genuine issue of material fact.

In essence, petitioner asks this Court to make another review of the evidence it presented to the district court. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corporation v. Catrett,* 477 U.S. 317, 324 (1986). Neither the district court nor the Eighth Circuit Court of Appeals could find that petitioner met its burden of producing evidence of a triable issue in the specific circumstances of this case.

This Court has ruled that such a review of the evidence is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss

specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). The lower courts have consistently held that petitioner failed its burden to demonstrate the existence of a genuine issue of material fact. Petitioner only seeks this Court to, once again, review its evidence.

### C.

### Judgment Was Properly Rendered by the District Court and Affirmed by the Eighth Circuit Court of Appeals.

The rules of civil procedure governing the entry of summary judgment provide that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Federal Rule of Civil Procedure 56(e) (1988).

In *Matsushita Electrical Industrial Company v. Zenith Radio*, 475 U.S. 574 (1986), this Court discussed the burden of production imposed upon the nonmoving party by this rule. This Court said:

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.' [The] purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial'.

*Matsushita Electrical Industrial Company v. Zenith Radio*, 475 U.S. 574 (1986) at 586. Defendant failed that threshold burden. That is, the record taken as a whole failed to demonstrate an existence of a genuine issue for trial.

Courts do not hesitate to grant summary judgment where a non-moving party's conduct clearly establishes an obligation. Mere verbal denials of liability do not satisfy the defendant's obligation to raise a genuine issue of material fact to overcome plaintiff's motion for summary judgment. *Yaritz v. Dahl*, 367 N.W.2d 616 (Minn. App. 1985); *Trnka v. Elanco Products Company, a Division of Eli Lilly*, 709 F.2d 1223 (8th Cir. 1983); *Murphy v. Country House, Inc.*, 307 Minn. 344, 240 N.W.2d 507 (1976). The foregoing cases demonstrate that where a contract establishes an obligation, a party's mere allegation of oral modification is insufficient to raise an issue of fact to prevent entry of summary judgment. Here, Yukon's allegation of accord and satisfaction is inconsistent with every statement and action subsequently made by the corporation, save the breach of the agreement with William Hagerman.

The evidence presented by William Hagerman established the terms and conditions of the technology agreement between Hagerman and Yukon. The evidence submitted by Hagerman also established that Yukon's claim that the contract had been modified was a sham defense. This showing by Hagerman placed the legal burden on Yukon to produce evidence from which the court could conclude that a genuine issue of fact existed as to whether or not the parties had reached an accord and satisfaction. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Petitioner has admitted all of the material allegations of Hagerman's Complaint in the registration documents

filed with the Securities and Exchange Commission and the Minnesota Department of Commerce for the public offering of Yukon Energy Corporation common stock. The technology agreement which was the foundation for the district court's entry of summary judgment in favor of Hagerman was attached as an exhibit to the registration statement filed in connection with the public offering of common stock. The prospectus itself is replete with references to the outstanding option held by William Hagerman without any qualification whatsoever. The prospectus also established the book value of the stock and the initial selling price. The petitioner's admissions left no question of material fact for trial. The district court was required only to apply the law to the facts submitted by petitioner.

The petitioner has consistently attempted to minimize the importance of the statements in its prospectus. The courts are not unmindful of the time and effort expended by the parties involved in the creation of a registration statement. The courts have examined and acknowledged the depth of involvement in conducting "due diligence" investigation in the preparation of a registration statement and the accompanyng prospectus for public stock offering. See, e.g., *Escott v. Bar Chris Construction Corporation*, 280 F.Supp. 643, 682 (S.D. N.Y. 1968); *Feit v. Leasco Data Processing Equipment Corporation*, 332 F.Supp. 544, 575 (E.D. N.Y. 1971).

The motivation to accomplish such far reaching, detailed study of the liability owing to Hagerman by petitioner is supplied by the substantial criminal and civil penalties imposed by the Securities Act of 1933, the Securities Exchange Act of 1934, and the Minnesota Securities Act. The overwhelming evidence of Yukon's own admissions clearly estab-

lished that Hagerman was entitled to judgment as a matter of law and squarely placed the burden to raise issues of material fact on the petitioner.

Petitioner attempted to raise an issue for trial by asserting that the technology agreement was modified. However, the prospectus and stock offering registration documents deny the existence of the alleged accord and satisfaction. More importantly, the statements on which petitioner relies to raise its defense were statements made subsequent to commencement of suit by Hagerman. The evidence presented by petitioner was nothing more than a reiteration of its pleadings. The Eighth Circuit Court of Appeals properly pointed out that petitioner failed to provide evidence of specific facts supporting its asserted affirmative defense of accord and satisfaction. (See *Hagerman v. Yukon Energy Corporation*, 839 F.2d 407 (1988), page A-7 of petitioner's Appendix).

In its Petition for Writ of Certiorari, petitioner argued that Hagerman agreed to privately underwrite an initial public offering of Yukon Energy Corporation stock. The first time this defense was raised by petitioner was in its appeal to the Eighth Circuit Court of Appeals. Petitioner had failed to raise this issue before the district court on Hagerman's motion for summary judgment. Petitioner also failed to raise this defense in its motion for reconsideration before the district court. These allegations should not be permitted as a defense at this time.

Petitioner's assertion of this defense is a transparent attempt to create a fact issue out of whole cloth. The only evidence offered by the defendant to support this claim is a combination of an uncertain statement by David Tjosvold, the president of the corporation, and the cover page of

Yukon's prospectus which notes the total number of shares offered to the public. This information does not give rise to a genuine issue of material fact. Again, if Yukon contested the nonperformance by Hagerman or the satisfaction of a condition precedent, it had the opportunity to state its position in the prospectus. The prospectus failed to mention any nonperformance on the part of Hagerman or the non-satisfaction of any condition precedent on the part of Hagerman.

Moreover, even accepting all of the inferences so liberally asserted by the petitioner in its Petition for Writ of Certiorari regarding the claim that Hagerman agreed to privately underwrite two million shares of a five million share stock offering, the conclusion does not serve to deny Hagerman summary judgment. The most liberal construction of these circumstances would be to conclude the existence of a unilateral contract offer by Hagerman to underwrite two million shares in the event Yukon Energy Corporation commenced a public offering of five million shares of stock. No such offering was made. Petitioner never made a claim for the underwriting. The Eighth Circuit Court of Appeals has recognized the lack of evidence supporting petitioner's allegations. This defense has no basis in fact and was properly rejected when heard the first time before the Eighth Circuit Court of Appeals.

In its Petition for Writ of Certiorari, the petitioner attempts to raise questions regarding the district court's determination of Hagerman's legal remedy. The decision of the district court and the affirmation by the court of appeals were in accordance with applicable law.

The legal construction of contracts is a matter for the court unless its terms are found to be unclear or ambiguous.

See, e.g. *Barnes v. Northwest Airlines,* 233 Minn. 410, 47 N.W.2d 180 (1951). The district court determined that the technology agreement unambiguously required Yukon to honor Hagerman's stock option upon the commencement of a successful public stock offering. Yukon completed the stock offering without having honored Hagerman's stock option. The court properly determined that the date of the breach of the technology agreement was the date of the public stock offering as a matter of law.

Similarly, the determination of Hagerman's option price was a matter of law. The court needed only to mechanically apply the unambiguous terms of the contract to the calculations made by the petitioner in its stock prospectus. Petitioner failed to bring to the court specific facts which would raise a genuine issue as to the propriety of these calculations. The court considered all the evidence presented by the parties. The court's determination was proper.

Petitioner argues that the fair market price of the stock on the date of the breach should have been discounted on the ground that Hagerman's stock was to be unregistered stock. The Eighth Circuit Court of Appeals properly observed that the petitioner did not claim the stock to be unregistered until after the court had entered judgment against it. More importantly, at the summary judgment motion hearing for the district court, counsel for the petitioner advised the court that the stock was not to be "lettered". The stock was to be freely transferable.

Finally, Yukon acceded to the district court's determination of damages. At the hearing during which the initial motions and crossmotions for summary judgment were heard by the district court, the parties primarily argued concepts of liability based upon the memoranda which had

been filed as of that date. Following oral argument, Judge Rosenbaum requested that the parties discuss the possible resolution of the issue of determination of the legal remedy. When the parties could not reach an agreement on how the court should determine its remedy, the district court required the parties to submit briefs arguing the issue of remedies.

The parties responded with appropriate memoranda on the issue of damages. The petitioner made no claim in its memorandum on damages that the procedure adopted by the court was inappropriate. In fact, the petitioner's memorandum states as follows:

> For the reasons set forth below, defendants respectfully submit that monetary damages, if any, should be determined in accordance with the principles set forth herein and in the attached affidavits, that any award of attorney's fees is unwarranted and unsupported, and that a determination as to costs must await the submission of proposed costs by the plaintiff.

(See Defendant's Memorandum of Law on Damages, Appendix to Appellant's Brief to the Eighth Circuit Court of Appeals, page 152).

In its memorandum on damages, petitioner proposed the following measure of damages:

> Thus, the appropriate maximum monetary damages which are awardable in the present circumstances should be determined by subtracting the book value per share from the fair market value per share at the time of the breach and multiply the resulting amount of the number of shares subject to the option.

(Defendant's Memorandum of Law on Damages, Appendix to Appellant's Brief to the Eighth Circuit Court of Appeals, page 152).

It is clear that the defendant believed damages were to be determined by the district court and participated willingly in this process. It is equally evident that the petitioner did not believe that a fact issue existed when the court requested that the parties submit briefs on damages. By its own statements, through previous counsel, the petitioner established, and agreed with plaintiff, that no fact issues remained on the issue of damages.

The record before the district court when it granted Hagerman's summary judgment supported the court's findings. The augmented record submitted by the petitioner on its motion for reconsideration before the district court also failed to raise any factual issues. The Eighth Circuit Court of Appeals, using the same standard of review as the district court, was equally unimpressed with the petitioner's speculative arguments. This Court need not consider issues not properly raised before the district court. More importantly, this Court need not consider the issues properly decided in the courts below. The Petition for Writ of Certiorari should be denied.

## CONCLUSION

The district court found that William Hagerman demonstrated that he was entitled to judgment as a matter of law and that petitioner failed to raise a genuine issue of material fact which would preclude entry of judgment. The Eighth Circuit Court of Appeals, using the same standard of review used by the district court, affirmed the decision of the district court. Petitioner has raised only questions turning entirely on the facts of this case, already resolved twice in favor of respondent, and without any impact outside the limits of this case. There is no compelling, special or important reason for the Court to exercise its discretion to review this matter. The Court should deny the Petition for Certiorari.

Respectfully submitted,

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